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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

CLIFTON ALTON PORET,

Petitioner

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

RUDOLPH F. BECKER, JR.,
Attorney for Petitioner.

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BRIEF ON BEHALF OF PETITIONER, CLIFTON ALTON PORET

Opinions Below

The opinion of the Supreme Court of Louisiana, is reported in *State of Louisiana* v. *Edgar Labat and Clifton Alton Poret*, No. 41-718, 226 La. 201, 75 So. 2d. 333.

Jurisdiction

The Judgment of the Supreme Court of Louisiana was rendered on July 2, 1954. *State* v. *Poret, et al.*, 226 La. 201, 75 So. 2d. 333.

Rehearing was denied October 5, 1954.

The petition for Writ of Certiorari was filed in United States Supreme Court December 31, 1954.

The petition was granted on February 28, 1955. 348 U.S. 950; 75 S. Ct. 444; 99 L. Ed. 307. No. 396 Misc. October Term 1954.

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Sec. 1257 (3).

Statute and Constitutional Provisions Involved

Article 202 of the Louisiana Code of Criminal Procedure —Louisiana Revised Statutes Annotated, R.S. 15:202.

Time for urging objections to array; waiver

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, *heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

Constitution of the United States

Amendment XIV

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

Questions Presented

Whether this Honorable Court should assume jurisdiction in this case, because there was no independent and adequate State ground supporting the conclusion reached by the State of Louisiana in denying petitioner, *his right to challenge the Grand Jury on the ground of Systematic exclusion of negroes therefrom, because of their race and color.*

Statement of the Case

On December 11, 1950, the Grand Jury for the Parish of Orleans, State of Louisiana, returned an indictment against petitioner, Clifford Alton Poret, a colored male, and against one Edgar Labat, also a colored male, charging them with the crime of aggravated Rape, denounced by Louisiana Revised Statutes R. S. 14:42.

The Victim of the alleged rape was one Helen Rajek, a white female, and it was allegedly committed on November 12, 1950.

The petitioner Clifton Alton Poret, was not arrested nor was he informed as to the Indictment against him, until Oc-

tober 1952, which was about one year and seven months after the Grand Jury that indicted him went out of office.

The term of the Grand Jury, that indicted Clifton Alton Poret, petitioner, began on September 5, 1950 and ended March 5, 1951.

In October of 1952 petitioner Clifton Alton Poret, was brought to Louisiana, from a penitentiary in the State of Tennessee, and arrived in New Orleans, Louisiana, on October 3, 1952 where he was held in the Parish Prison, until October 27, 1952 at which time he was brought into court to be arraigned on the Indictment returned against him December 11, 1950.

On October 27, 1952 Clifton Alton Poret, went to court, attended by counsel, retained the day before, and a continuance of the arraignment was obtained from the court, to enable counsel for Clifton Alton Poret, *to file any pleadings that he desired to file.*

On November 7, 1952, the defendant, Clifton Alton Poret, through his counsel, filed his motion to quash the Indictment; the Grand Jury Venire, the Grand Jury Panel and the Grand Jury that returned the Indictment against him, because of the systematic unlawful and unconstitutional exclusion of negroes from said units.

That upon the filing of said Motion to Quash, the matter was continued by the court until November 17, 1952.

On November 17, 1952 the State of Louisiana, through the District Attorney, filed a Demurrer to the Motion to Quash, on the Grounds that the Motion to Quash was filed too late, under Louisiana Revised Statutes, R. S. 15:202.

Thereafter arguments were heard by the Court on the State's Demurrer, and on January 7, 1953 rendered a Judgment sustaining the State's Demurrer, and denying to Petitioner Clifton Alton Poret, his constitutional right, to be

heard and to introduce evidence in support of his motion to Quash.

Argument

The State's Demurrer is based upon Louisiana Revised Statutes, R.S. 15:202 and the case of *State of Louisiana* v. *Anthony Wilson*, 14 So. 2d. 873.

This Statute is the same as Article 202 of the Louisiana Code of Criminal Procedure, which is the same as Act 44 of 1877 limiting the time for filing a Motion to Quash, etc., *to the first day of the Jury term, while* R.S. 15:202 limits the filing of a Motion to Quash, before *the expiration of the third judicial day of the Jury term.*

Until the *Wilson* case, the Louisiana Courts, in construing Act 44 of 1877 and Article 202 of the Louisiana Code of Criminal Procedure, held that, the "third Judicial Day" rule does not apply when the crime was committed or the indictment was found after said date.

State v. *Strickland*, 41 La. ann. 514
State v. *Vegas*, 19 La. ann. 105
State v. *Texada*, 19 La. 436
State v. *Vance*, 31 La. ann. 398
State v. *Clevery*, 43 La. ann. 1133

In the *Wilson* case and the case at Bar, the crime is alleged to have taken place, long after the first three days of the Grand Jury term, therefore to sustain the State's position, and to keep the defendant from having the Indictment Quashed, the courts had to place a *strained* interpretation, on R. S. 15:202.

Since that decision there has existed nothing but confusion.

Professor Dale E. Bennett of the Louisiana State University, an authority on Criminal Procedure in Louisiana,

sets forth the difficult legal situation in a recent article from which we quote:

> Another source of considerable difficulty and dissatisfaction has been the requirement of Article 202 that objections to the general venire or jury lists must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard". This article is apparently aimed at securing prompt objections to jury venires and jury lists, but it presents a cure which is distinctly worse than the situation which it purports to remedy. Insofar as it relates to objections to the Grand Jury Panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable.
>
> * * * * * * *
>
> The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions. Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits." Even more latitude is apparently contemplated by the declaration in Article 253 that objections

to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permits". In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202, certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to plead otherwise. In such cases Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the Merits. While Article 253 authorizes the Judge to permit the filing of the motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combination of Articles 284 and 287 would effect such clarification. At any rate,

Article 202 should be eased out of the picture in this regard.

Louisiana Criminal Procedure—a critical appraisal, XIV Louisiana Law Review—17—20—21, December, 1953.

It is to be noted that the above pattern, which the Professor states would be "well set to the veteran criminal lawyer or trial judge," ignored "the possible complication of *Article 202.*" Yet your petitioner was denied his right to challenge the array, the venire of the grand jury that tried him on the ground of systematic exclusion of negroes for the reason that according to the trial judge and the Supreme Court of Louisiana, his motion to quash was filed "too late", according to the provisions of *Article 202.*

In view of the above, it is submitted that your petitioner could not have waived his right to challenge the Grand Jury and the Venire and the Panel, when he was not in the Jurisdiction of the Court, nor did he have the assistance of Counsel to advise him of his right to timely challenge said Grand Jury, the Venire and the Panel.

II

This Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the array, the venire and the grand jury on the ground of systematic exclusion of negroes therefrom.

As was stated by the minority of the Court in the recent case of *Williams v. Georgia,* U. S. , 75 S. Ct. 814, 828, L. Ed. (1955), a purported state ground is not independent and adequate in two instances. First where the circumstances give rise to an inference that the state court

is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. Second, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

It is submitted that both of the above tests are applicable in petitioner's case. The record indicates that petitioner's motion to quash the indictment was held by the trial court and the Supreme Court of Louisiana to have been filed "too late", according to the provisions of *Article 202 of the Louisiana Code of Criminal Procedure*. Petitioner then urged by way of a motion in writing that said Article was patently unconstitutional. Said Article provides as follows:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the *third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.
>
> *Louisiana Statutes Annotated, R. S. 15:202.*

If the Article be interpreted *as passed by the legislature*, "the third judicial day of the term for which said jury shall have been drawn", had expired long before the alleged crime was committed. The Grand Jury which indicted your petitioner was impaneled on September 5, 1950 and, therefore, under the *Article as written*, your petitioner had until *September 8, 1950* in which to file the objection to the array or venire.

This he obviously could not do as the alleged crime was not committed until more than two months later on *November 12, 1950*, and defendant was not indicted until *December 11, 1950*, more than three months after the date for objecting to the array or venire had elapsed, *according to the Article as written*.

However, the Louisiana Supreme Court in the case of *State v. Wilson*, 204 La. 24, 14 So. 2d 873, interpreted the above plain language to mean the *third day after* the end of the term of the Grand Jury.

This interpretation by the Supreme Court gave rise to the following comment in the *Tulane Law Review* branding it as an interpretation which can be used as a "means of sidetracking the issue of race discrimination in selecting juries".

We quote:

> "Today when grand jury terms and court terms do not coincide, the language of Article 202 falls far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the Supreme Court. *In its present, ambiguous form, this Article is one source of confusing technicalities of procedure in criminal cases which can be used as a means of sidetracking the issue of race discrimination in the selecting of juries.* To protect the rights of an accused person in Louisiana, it is suggested that the legislature clarify *Article 202*,

making plain its scope and the extent of the time limitation it imposes. The general explanation in the present Article of the type of objection covered is inadequate, particularly if the interpretation of prior statutes on the same subject cannot be relied on. Just what objections must be urged within the strict time limit of *Article 202* rather than the more extended period allowed by subsequent articles on quashing indictments generally should be made clear. The apparent conflict among the subsequent articles with regard to the time during which indictments may be quashed on grounds other than those included in *Article 202* might well be resolved by the legislature." *18 Tulane Law Review 462 (481), 1944.*

The "reductio and absurdum" of the strained interpretation of *Article 202* was finally reached in the most recent Louisiana case of *State v. Chianelli*, 226, La. 552, 76 So. 2d 727, (1955), by the *Louisiana Supreme Court.*

We quote from this opinion:

> We concede that this Court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to be judicial legislation rather than judicial interpretation. Nevertheless, this Court's construction and interpretation of Article 202 in the Wilson case has been approved by this Court in two recent cases, *State* v. *Michel*, 225 La. 1040, 74 So. 2d. 207 and *State* v. *Labat, et al*, 226 La. 201, 75 So. 2d 333. * * *
>
> Article 202 of the Code of Criminal Procedure requires legislative not judicial action; but the Legislature in amending this Article should be careful not to incorporate in it any provision that would subject the

statute to an attack on the ground of a denial of due process of law.

It is to be noted that the Louisiana Supreme Court quotes your petitioner's own case as authority for the interpretation of *Article 202*, which the Court itself concedes "somewhat strained" and which amounts to "judicial legislation rather than judicial interpretation".

The position above taken by petitioner is supported by an excellent comment in the Louisiana Law Review of June, 1955.

> *The present interpretation of Article 202*, as established by the Wilson case and applied to objections to petit jury venires in the Chiânelli case, *is subject to critism*. This construction in regard to objections to grand jury venires, *fails to provide for cases in which an accused is not assisted by counsel until on or after the third judicial day after the expiration of the grand jury term.*
>
> . . . . . .
>
> The basic problem of statutory construction is one of ascertaining the intent of the legislature. In relation to Article 202, the generally applicable canons of statutory construction would lead to a different conclusion from that announced in the Wilson case. Thus, under the "plain meaning" rule or "rule of literalness", it is difficult to say how the phrase "of the term" could be construed as meaning "after the term." However, since a literal interpretation would lead to the incongruous result of depriving many accused persons of the right of objecting to jury venires, the plain meaning of the language of the statute should not be relied upon as conclusively proving the legislative intent.
>
> . . . . . .

However, it is submitted that the court in the Wilson case *was guilty of judicial legislation.* Also, since this Supreme Court can at any time decide that the rule of the Wilson case is illogical and revert to the prior rule, an accused person is at the present somewhat insecure in waiting until after the first three judicial days of the term to raise objections to the jury venire. Possibly the only solution lies in the amendment of Article 202 by the legislature. *TIME FOR URGING OBJECTIONS TO JURY LISTS AND VENIRES: ARTICLE 202, LOUISIANA CODE OF CRIMINAL PROCEDURE. XV Louisiana Law Review 749, 751, 754. (Italics by writer of brief.)*

A complete statement of the historical background of *Article 202* is presented by the late Chief Justice O'Neill of the Louisiana Supreme Court in a lengthy dissenting opinion of the case of *State* v. *Anthony Wilson* 204, La. 24, 14 So. 2d. 873, 885 (1943). Justice O'Neill concludes his opinion with the statement that the construction of *Article 202* by the majority of the Court and by the trial judge in that case "is not only contrary to the wording of the Statute—and contrary to the jurisprudence on the subject but is, in fact, an impossible construction."

It is this same "impossible construction" that was relied on by the trial judge and the Supreme Court of Louisiana in your petitioner's case. See *State* v. *Labat*, 226, La. 201, 75 2d. 333 (337).

We quote briefly from the Chief Justice's dissenting opinion:

> The limitation as expressed in the article (Article 202) is not applicable to this case; *but the trial judge has made the limitation applicable to this case by giving the limitation a meaning which its wording does not express, and thus, has denied the defendants*

the right even to make the objection that he was denied the equal protection of the laws. State v. Wilson, Supra at 14 So. 2d. 889. (Italics by writer of this brief).

It is, therefore, submitted that there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner the right to challenge the array, the venire and the grand jury on the ground that he was denied the equal protection of the laws. The circumstances surrounding this case certainly give rise to an inference that the law of the State of Louisiana, namely *Article 202 of the Code of Criminal Procedure* was interpreted with the specific intent to deprive your petitioner of a Federal right. Even assuming that the State Court is not guilty of an evasion and that the law of Louisiana was honestly applied, and even dictated by precedents, it is clear that the State law as interpreted by the Supreme Court in your petitioner's case throws such obstacles in the way of enforcement of his Federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

That there is at least a prima facie case on petitioner's behalf, that there has been a systematic exclusion of negroes from the jury can hardly be denied by the State of Louisiana. In fact, the judges of the Criminal District Court for the Parish of Orleans seem to take "judicial notice" of this fact by making statements for the public press to the effect that in only one instance *in history has a negro ever served on a Grand Jury*, and that was because of a mistake, wherein a judge picked a light-skinned negro to serve on a Grand Jury under the mistaken belief that he was white.

It is obvious that petitioner, as a result of "strained interpretation" and "judicial legislation" by the Courts of Louisiana, has been placed in a situation, condemned by

this Court in *Hernandez* v. *Texas*, 347, U.S. 667; 74 S. Ct. 667; *Carter* v. *Texas* 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Patton* v. *Mississippi* 332, U.S. 463, 68 S. Ct. 184.

The result of the decision of the Courts of Louisiana is to deny petitioner's right even to make the objection in Louisiana, and petitioner's plea in this Court falls within the scope of the ruling of Chief Justice Holmes in *Rogers* v. *Alabama:*

> It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. *Rogers* v. *Alabama* 192 U.S. 226, 24 S. Ct. 257, 74 L. Ed. 870.
>
> Whatever springs the State may set for those who are endeavoring to assert rights the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice. *Davis* v. *Wechsler* 263, U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143.
>
> It therefore is within our province to inquire not only whether the right was denied in substance and effect, as by putting forward non-Federal grounds of a decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untenable, may be then put forward successfully, our power to review may easily be avoided. *Ward* v. *Love County*, 253 U.S. 17, 64 L. Ed. 753.

Your petitioner, therefore, submits that this Court should assume jurisdiction as the purported non-Federal grounds upon which his case was decided by the Supreme Court of Louisiana are plainly untenable and without any fair and reasonable support, and that the law of Louisiana in *Article*

202 of the Code of Criminal Procedure as interpreted by the S. Ct. of Louisiana and specifically applied to his case should be struck down as it amounts to a *local practice* denying to him the assertion of a Federal right.

Summary of Argument

I. Petitioner was denied Due Process of Law and the Equal Protection of the Law, by the State of Louisiana, in that your petitioner was not within the Jurisdiction of the Louisiana Courts during the entire time that the prescriptive period under R.S. 15:202 was running. That almost two years had passed before he was returned to Louisiana to face the charge against him.

That before his arraignment he filed his Motion to Quash the Indictment, which under the Louisiana Statutes, (Article 202 of the Code of Criminal Procedure excepted) was the proper time to file same.

The Louisiana Courts then held that petitioners right to challenge the Grand Jury that indicted him on the Grounds of systematic exclusion of negroes, because of their Race and color, had prescribed during this period of time.

II. There was no independent and adequate state ground supporting the conclusion reached by the trial judge and the Supreme Court of Louisiana in denying petitioner the right to challenge the Grand Jury on the ground of systematic exclusion of negroes. The Supreme Court of Louisiana has in subsequent cases admitted that its construction of the Articles of the Louisiana Code of Criminal Procedure, under which petitioner's rights were denied, was a "strained construction" and amounted to "judicial legislation".

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded so as to give petitioner the right to show that he

was denied due process of law and the equal protection of the laws as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, by the State of Louisiana through its administrative officials, its laws, and its courts, in systematically excluding negroes, members of his race, from the array, the venire and the Grand Jury which indicted him.

Respectfully submitted.

RUDOLPH F. BECKER, JR.
Attorney for Petitioner.

Certificate

I hereby certify that a copy of this Brief has this day been served upon Honorable Fred LeBlanc, Attorney General of the State of Louisiana, and upon Honorable Leon D. Hubert, District Attorney for the Parish of Orleans, State of Louisiana.

New Orleans, Louisiana
August 22, 1955

RUDOLPH F. BECKER, JR.
Attorney for Petitioner.

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